INDEX.

	Page
Question Presented	1
Statement	2
Questions Not Previously Raised	8
Reasons for Not Granting the Writ	9
Conclusion	14

Table of Cases.

Barbour v. State of Georgia, 249 U. S. 454, 39 S. Ct. 316, 63 L. Ed. 704 (1919)	9
Emory University v. Nash, 218 Ga. 317, 127 S. E. 2d 798 (1962)	13
Herndon v. State of Georgia, 295 U. S. 441, 55 S. Ct. 794, 79 L. Ed. 1530 (1935)	9
Jones v. Habersham, 107 U. S. 174, 2 S. Ct. 336 (1883)	12
Shelley v. Kraemer, 334 U. S. 1, 68 S. Ct. 836, 92 L. Ed. 1161 (1948)	12
In Re: Smith Estate, 37 A. 114 (1897)	12

Statutes.

Const. Ga. 1945, Art. 7, sec. 1, par. 4, Ga. Code Ann. 2-5405	8
Ga. Code Ann. 69-502	12
Ga. Code Ann. 69-504	12, 13
Ga. Code Ann. 92-201	8

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1964.

No. 959.

E. S. EVANS, et al.,
Petitioners,

v.

CHARLES E. NEWTON, et al.,
Respondents.

BRIEF

In Opposition to Petition for Writ of Certiorari to the Supreme Court of Georgia.

QUESTION PRESENTED.

Here certain land was devised in trust for a park for white persons only. The testator by clear language manifested a disapproval of the idea of any recreation area being open to the members of both the white and negro races. The legal title was to be held by the City of Macon or its successors in said trust, subject to control by a Board of Managers, composed of private citizens selected as provided in the will.

When negro citizens began to use the park's facilities, the Mayor and Council of the City by formal resolution after institution of suit to remove the City as Trustee resolved to resign, declaring it to be "against good conscience" that the City should attempt to remain as title holder to the trust property.

Under these circumstances where the City tenders its resignation as trustee to a court of equity, whether in the midst of litigation seeking its removal or otherwise, is it a denial of constitutional rights of negro citizens of the community for the court to appoint successor trustees and to refuse to command the City to continue to serve where it is argued on behalf of these negro citizens that only by retaining the City as trustee can it be assured that both races will have access to the park area?

STATEMENT.

Respondents, members of the Board of Managers of Baconsfield, incorporate by reference the statement of the case contained in the opinion of the Supreme Court of Georgia and set out in the appendix of the Petition for Writ of Certiorari.

These respondents wish to make certain additions to that statement as follows:

A. O. Bacon was a soldier in the service of the Confederate States of America and for nearly twenty (20) years a United States Senator from Georgia. The following quoted excerpts from Item Ninth of his will are most relevant to the present inquiry (R. 30-33).

> ". . . it is my will that all right, title and interest in and to said property hereinbefore described and bounded, both legal and equitable, including all remainders and reversions and every estate in the same of whatsoever kind, shall thereupon vest in and belong

to the Mayor and Council of the City of Macon, and to their successors forever, in trust for the sole, perpetual and unending, use, benefit and enjoyment of the white women, white girls, white boys and white children of the City of Macon to be by them forever used and enjoyed as a park and pleasure ground, subject to the restrictions, government, management, rules and control of the Board of Managers hereinafter provided for; the said property under no circumstances, or by any authority whatsoever, to be sold or alienated or disposed of, or at any time for any reason devoted to any other purpose or use excepting so far as herein specifically authorized. For the control, management, preservation and improvement of said property there shall be a Board of Managers consisting of seven persons of whom not less than four shall be white women, and all seven of whom shall be white persons. The Members of this Board shall first be selected and appointed by the Mayor and Council of the City of Macon, or by their successors in said trust; and all vacancies in said Board shall be filled by appointments made by the Mayor and Council of the City of Macon, or their successors, upon nomination made by the said Board of Managers and approved by the said Mayor and Council of the City of Macon or their successors. If practicable, I desire that there shall be as a member of said Board of Managers at least one male or female descendent of my own blood, not only in the Board as at first constituted, but at all times thereafter. The said Board of Managers shall at all times have complete and unrestricted control and management of the said property, with power to make all needful regulations for the preservation and improvement of the same, and rules for the use and enjoyment thereof, with power to exclude at any time any person or persons of either sex, who may be deemed objectionable . . . "

". . . I take occasion to say that in limiting the use and enjoyment of this property perpetually to white people, I am not influenced by any unkindness of feeling or want of consideration for the Negroes, or colored people. On the contrary I have for them the kindest feeling, and for many of them esteem and regard, while for some of them I have sincere personal affection."

"I am, however, without hesitation in the opinion that in their social relations the two races should be forever separate and that they should not have pleasure or recreation grounds to be used or enjoyed, together and in common."

In accordance with the foregoing quoted provisions of the will of A. O. Bacon the City of Macon until its resignation was the passive title holder, and the Board of Managers created by Mr. Bacon exercised those powers and fulfilled those obligations bestowed by the testator.

Contrary to what was stated to be a presumption at the bottom of page 12 of the Petition for Writ of Certiorari the Board of Managers has never been regarded by itself or by the City as an agency of the City or as a body entitled to the services of the City Attorney. Over the years the Board has always employed private counsel, in fact, members of the law firm representing it in the present litigation. Petitioners attach significance to the fact that the Board sued as individuals rather than as a body. See pages 12 and 13 of the Petition. The State of Georgia having granted the Board no corporate status nor given it any power to sue as a unit, the Board being only a creation of the testator could only sue as individual fiduciaries, just as does any other trustee, to comply with their obligation to control and manage the trust corpus in accordance with the terms of the will.

At the direction of the testator the Mayor and Council as trustee appointed the original Board and have "ap-

proved'' the Board's ''nomination'' of persons to fill vacancies in its membership when they occurred. (See again the will provision in this regard, supra.) Presumably, it is for this reason that petitioners insist that the Board as constituted at the time it instituted suit was a state agency.

Respondent Board members deny that the Board as constituted at the outset of this litigation could be meaningfully viewed as a state or governmental agency. Further, after the resignation of the City and the appointment of new trustees by the Superior Court of Bibb County, Georgia, the Board serving at that time resigned (R. 115), and the three new trustees thereupon appointed a Board of seven persons of whom four had not served on the Board at any previous time (R. 116).

Members of the Board of Managers have always served without compensation.

The following are excerpts from the Resolution of the Mayor and Council of the City of Macon dated February 4, 1964 and attached to the pleading by which the City sought to have the Superior Court of Bibb County accept its resignation as trustee of Baconsfield (R. 92-93):

> ''Whereas the Mayor and Council are greatly concerned that if Baconsfield is not operated and maintained in accordance with all of the provisions of the will of Senator Bacon, the property may revert to private persons who are heirs at law of or legatees under the will of Senator Bacon, in which case Baconsfield would become commercial or residential property or property of a nature wherein no part of the public would have the enjoyment of the property contemplated by Senator Bacon; and . . .''
>
> ''. . . Whereas, it is the considered opinion of the Mayor and Council that it is against good conscience for the City of Macon to continue to serve as trustee

under said will under circumstances where as such trustee it cannot carry out the plain and unambiguous terms of the trust; and . . ."

". . . Whereas, under certain decisions of the Federal Courts the City of Macon has realized that it could not as a municipal corporation carry out all of said provisions; and . . ."

Having made the foregoing statement of facts, respondents now comment briefly on certain assertions in the statement of petitioners lest their acquiescence therein be construed as agreement.

Respondents submit that the two "Questions Presented" as outlined on page 2 of the Petition contain assertions of fact and statements of conclusions not supported by the record or by the facts as they exist. In regard to the first Question respondents show that the City of Macon did not petition a court of equity. It merely tendered its resignation as trustee in pending litigation instituted against it. Petitioners in that Question refer to the Superior Court of Bibb County as appointing new trustees for the purpose of excluding Negroes from the park. The facts of the case show only that the Court found a trust without a trustee and exercised the very normal duty of appointing one. Since shortly after Jarndyce v. Jarndyce (Dickens' **Bleak House**) courts of equity have not made a practice of compelling unwilling trustees to serve, nor have the courts embarked upon the continuous course of supervision which is necessary where a trustee is in fact unwilling. Any assertion beyond that as to any motivation on the part of the Superior Court of Bibb County is a mere matter of conjecture.

The first Question further refers to the City as administering the park through the Board of Managers. Yet Mr. Bacon's will bestows all the powers of management upon the Board (R. 31). There is nothing in the record to indicate that the City as trustee ever usurped any of

those powers. Indeed, such is not the case. Rather, the Board has at all times made policy and exercised control.

There is also a reference to Negroes being "allowed" to use the park. That phrase would not be accurate if construed to denote an express grant of permission. No permission was sought or granted, but rather certain Negro citizens began using the facilities of the park.

Perhaps the characterization of Baconsfield as a "public" park begs the question.

With regard to the second Question on page two of the Petition for Writ of Certiorari, respondents deny that Georgia statutes properly construed condition tax exemption on the maintaining of racial "segregation" with regard to a charitable trust such as Baconsfield. Further, it is the Board of Managers rather than the City of Macon which has "administered" the park.

On page 8 of the Petition it is stated that no evidentiary hearing was held in the Superior Court of Bibb County after respondent Board members moved for a summary judgment. Respondents based their motion solely on the pleadings in the belief that no evidence was necessary to illuminate the issues. Under Chapter 110-12, Georgia Code Annotated (Acts 1959, pp. 234-236) upon the filing of such a motion seeking a judgment on the pleadings any party who feels that factual issues should be raised may file affidavits and depositions. Petitioners intervened in Bibb Superior Court on May 29, 1963. That Court entered its order granting respondents a summary judgment on March 10, 1964. At no time during the interim did counsel for those who are petitioners here express any desire to take evidence. It was therefore quite proper for the Superior Court to rule on the motion on the basis of the pleadings before it.

QUESTIONS NOT PREVIOUSLY RAISED.

The Petition for Writ of Certiorari at pages 13 and 14 discusses at some length the responsibility of the Mayor and the Council of the City of Macon for alleged acts of discrimination. No such question was raised by petitioners in the Superior Court of Bibb County or in the Supreme Court of Georgia, but rather the record is entirely silent as to any such issue. Respondents respectfully submit that petitioners may not properly raise this issue for the first time in their Petition for Writ of Certiorari.

Petitioners set out on pages 3 and 4 of their Petition Georgia Code Sections 2-5404 and 92-201, which petitioners contend condition the tax exemption of charitable trusts on racial separation. On page 20 they set out Georgia Code Section 69-505 in a footnote. None of these three statutes or any issue concerning them was mentioned by petitioners in the Superior Court of Bibb County or in the Supreme Court of Georgia, but rather the record is entirely silent as to any contention that any of these statutes is relevant to this case. Petitioners may not properly raise the issues they seek to raise involving these statutes for the first time in their Petition for Writ of Certiorari.

Pages 21 through 24 of the Petition are devoted almost entirely to an argument that certain enumerated Georgia Code Sections from Titles 69, 85 and 108 of that Code bestow upon charitable trusts in Georgia such a governmental nature that such trusts must be regarded as being subject to the inhibitions of the Fourteenth Amendment. The statutes referred to grant perpetual existence, a limited immunity in tort, and certain tax immunity to charitable trusts. Further there are among their number sections providing for supervision of charitable trusts by courts of equity, for enforcement of them by the attorney general, and for the application under proper circumstances of the doctrine cy pres.

No issue concerning the effect of these statutes was made by petitioners either in the Superior Court of Bibb County or in the Supreme Court of Georgia. Petitioners may not properly raise this constitutional question for the first time in their Petition for Writ of Certiorari.

The Supreme Court of the United States has recognized that under Georgia practice federal constitutional questions must be raised at the outset in the superior courts. **Barbour v. State of Georgia**, 249 U. S. 454, 39 S. Ct. 316, 63 L. Ed. 704 (1919), and that such questions must be preserved in the bill of exceptions to the Georgia Supreme Court. **Herndon v. State of Georgia**, 295 U. S. 441, 55 S. Ct. 794, 79 L. Ed. 1530 (1935). In these cases where a federal constitutional question was not raised in a timely manner or preserved on appeal as required by state law, the Supreme Court of the United States, following a well settled rule of practice, declined review as to the said questions.

REASONS FOR NOT GRANTING THE WRIT.

Respondents submit that this Petition for a Writ of Certiorari should be denied because the case was correctly decided by the Supreme Court of Georgia, and because the decision of that Court does not conflict with any decision of the United States Supreme Court or of any other court, State or Federal, in this land.

Petitioners complain that in the change in the trustee of Baconsfield several different agencies have taken actions denying them certain constitutional "rights". These agencies are the Mayor and Council of the City of Macon which resigned the trust, the Board of Managers which sued the City to force its removal, the Superior Court of Bibb County which accepted the resignation of the City and the State of Georgia whose legislature passed certain statutes complained of by petitioners as fostering racial discrimination.

First of all it is the basic position of these respondents that none of these agencies denied any "rights" of petitioners, since only those persons falling within certain classifications described by Mr. Bacon as persons to be benefited have any "right" to share in his gift. A fortiori petitioners have no standing to complain of a change in trustee.

Having stated this basic position, these respondents will deal further with the issues raised by petitioners as to each of these agencies.

In pointing at alleged instances of state "discrimination" petitioners make the following statement on page 14 of the Petition:

> ". . . By contrast, the mayor and council of the City of Macon bear direct, if not primary, responsibility for the racial discrimination brought about by this suit."

In support of the foregoing assertion petitioners argue in substance that the Mayor and Council of the City of Macon should not have resigned as trustee of Baconsfield, but rather that they should have resisted all efforts at their removal and attempted to continue to serve as trustee ignoring the racial limitation though that limitation is so emphasized by the testator that it may only be viewed as an essential and indispensable part of the trust purpose.

Respondents submit that while petitioners did from the beginning of this litigation point to the Court's acceptance of the City's resignation as a type of action forbidden by the Fourteenth Amendment and did from the beginning complain of certain actions of the Board of Managers, which petitioners insist is a branch of the City, petitioners are now raising for the first time in their Petition for Writ of Certiorari the question of whether or not the Mayor and Council, in resigning rather than resisting further, violated any constitutional rights of petitioners.

Since city action has never been so complained of before, either in the Superior Court of Bibb County or in the Supreme Court of Georgia, the question of any responsibility of the Mayor and Council for racial discrimination is not a question properly before this Court.

Further, whether or not the Mayor and Council were justified in fearing a reversion under the law of Georgia in the event that they did not withdraw as trustee, as that fear is expressed in their Resolution, supra (R. 92-93), it is apparent from that Resolution that it was that fear rather than a desire to exclude Negroes from a park area which motivated them.

It is, of course, true that the doctrine cy pres has been often applied in Georgia, but that doctrine under Georgia law is an intent-enforcing doctrine, and no case is known in which the doctrine was applied for the purpose of applying trust property to a use expressly disapproved of by the settlor. (See again the passage in the will (R. 32-33) where Mr. Bacon expressly disapproves of recreation grounds to be used by both races.)

Further, there is doubt as to whether Mr. Bacon's will evidences any general charitable intent beyond the very specific, detailed plan he outlines for a park for white women and white children. A general charitable intent is universally considered a prerequisite to the application of cy pres.

On the basis of facts before noted respondents submit that the Board of Managers of Baconsfield may not be viewed as a governmental agency. However, it is the position of respondents that it is utterly irrelevant whether the Board as constituted at the beginning of this litigation be viewed as a governmental unit or not. The City was not removed as trustee by the Superior Court, but rather it resolved to resign, an action which it might have taken

without any suit by the Board of Managers or anyone else ever having been filed.

In accepting the resignation of the City of Macon and appointing three persons to serve in its stead as trustees, the Superior Court of Bibb County, Georgia performed a normal function of a court of equity. Courts do not normally command persons to be trustees who do not wish to serve in that capacity. **Shelley v. Kraemer**, 334 U. S. 1, 68 S. Ct. 836, 92 L. Ed. 1161 (1948), does not require a court of equity to take affirmative action to compel an unwilling trustee to serve in order to render ineffective valid limitations as to race contained in a private testament.

The administration of Baconsfield in all particulars including the limitation as to race is the product of private choice. No amount of argument regarding Georgia Code, Section 69-504, set out at page 18 of petitioner's brief, can obscure that fact.

The authorization embodied in that statute was unnecessary to the creation of Mr. Bacon's trust. Nor was any statute needed in order to have created a trust for a park for citizens of both races with or without a city as trustee. The law of charitable trusts as understood at common law has always been in full force and effect in Georgia. **Jones v. Habersham**, 107 U. S. 174, 2 S. Ct. 336 (1883). Further, the law of charitable trusts as recognized at common law has been often held to include gifts in trust for the creation of a park. **In Re Smith Estate**, 37 A. 114 (1897). Section 69-504 was not necessary to the creation of a trust involving a park. Nor was it necessary to create a trust with a municipal corporation as trustee. Georgia Code, Section 69-502 (Acts 1892, p. 104), making no reference to race, reads as follows:

> "May act as trustee—The incorporated towns and cities may act as trustees under any conveyance or will

> donating or giving property for charitable or eleemosynary purposes."

Further, Georgia Code, Section 69-504 (Acts 1905, p. 117), did not require limitation as to race. Rather the language is obviously permissive. A settlor is not required to limit his bounty to one race. Rather he "may" so limit his gift if he so desires. Such is the tenor of the statute.

Furthermore, the following quotation from Item Ninth of Mr. Bacon's will makes it abundantly clear that the racial limitation was the product of private choice and that the state was to no significant extent involved (R. 32-33).

> ". . . I am, however, without hesitation in the opinion that in their social relations the two races should be forever separate and that they should not have pleasure or recreation grounds to be used or enjoyed, together and in common . . ."

As another alleged example of state discrimination petitioners refer to Georgia Code, Sections 2-5404 and 92-201, on pages 3 and 4 of their Petition. As before noted they are mentioning those two statutes for the first time in their Petition. These provisions they read as requiring racial separation as a prerequisite to tax exemption in the case of a charitable trust. The provisos making reference to race were not in effect at any time during Mr. Bacon's life. The statutes are apparently not cited for any influence those provisos may have exerted upon him. In the case of trusts for colleges, which they purport to cover, the Supreme Court of Georgia has held in **Emory University v. Nash**, 218 Ga. 317, 127 S. E. 2d 798 (1962), that the statutes do not deny tax exemptions to racially desegregated colleges. No case has arisen involving a park, but in a concurring opinion in **Nash** it is suggested at 127 S. E. 2d 803 that the proviso relating to race is so indefinite as to be utterly void.

The statutory provisions in question do not in any event by any normal construction apply to parks or require racial separation as a prerequisite to exemption, but instead the exemption is denied only where endowment funds directed as a matter of private choice for the members of one race are applied in violation of the limitation. Nothing about the statute denies exemption where there is racial "desegregation" but only where there is a misapplication of funds.

Having dealt with the arguments of petitioners concerning the various agencies which allegedly denied them constitutional "rights", respondents submit that the only question involved in this litigation is whether under the attendant circumstances the Superior Court of Bibb County could accept the City's resignation, and that no reason appears for that Court to have required this unwilling trustee to serve.

CONCLUSION.

For the foregoing reasons the Petition for Writ of Certiorari should not be granted.

Respectfully submitted,

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